TESTIMONY OF RICHARD D. KOMER

To

THE SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNEMNTAL AFFAIRS

MILWAUKEE, WISCONSIN

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Good evening, and thank you for inviting me to testify before you today. It is a great privilege and honor for me to be here, even though I have incurred the wrath of my wife and children by interrupting our family vacation in Maine.

My name is Richard Komer, and for the last 22 years I have been a senior attorney at the Institute for Justice ("IJ") in Arlington, Virginia, a public interest law firm that litigates cases involving the freedom of speech, private property rights, economic liberty, and school choice. My work is exclusively in our school choice area, and I head our school choice team. We help defend school choice programs that states enact, representing parents who want to use the scholarships made available for their children's education. We have participated in 23 such lawsuits to date, including the successful defense of both cases to reach the United States Supreme Court: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Arizona Christian School Tuitioning Organization v. Winn*, 563 U.S. ___ (2011). More relevantly, the Institute for Justice was involved in both cases defending the Milwaukee Parental Choice Program in the Wisconsin Supreme Court, *Davis v. Grover*, 480 N.W.2d 460 (1992), and *Jackson v. Benson*, 578 N.W.2d 602 (1998).

In addition to defending school choice programs after they are passed, the IJ school choice team is often asked to help design school choice programs and to testify in legislative hearings about proposed bills. The last time I was in Wisconsin was in 2011, when I was invited to testify before the House Education Committee about a school choice bill that would have created a scholarship program

targeted to children with special needs. I testified in favor of the bill, and although the bill failed that year and in several subsequent sessions I am delighted to say that this year a special needs scholarship bill has finally passed.

With passage of the new Wisconsin program there are now 17 scholarship programs specifically targeted to children with special needs in 12 states. In addition, several broader programs that include scholarships to both students with and without disabilities provide larger scholarships for children with special needs. The oldest and largest of the special needs programs, the John M. McKay Scholarships for Students with Disabilities Program, enacted in 1999, now enrolls over 29,000 students in over 1,270 private schools. This is actually more students than Milwaukee's Parental Choice Program serves, which is the oldest modern school choice program, begun in 1990. In short, far from ignoring the population of children with special needs, the school choice movement has in fact recognized that the families of these children, like all families, need and can benefit from the greater array of educational opportunities that school choice can provide.

The reason that the school choice movement encourages both the creation of freestanding scholarship programs for children with special needs and the provision of larger scholarship amounts for such children in broader programs is that the education of children needing special education is often more expensive than educating other children and often requires special services and teachers with special training. The federal government has long recognized this fact by its creation and ever increasing funding of the IDEA, the Individuals with Disabilities Education Act, which subsidizes state special education programs with billions of dollars every year. It is the federal government's second largest education aid program, exceeded only by Title I's aid to economically disadvantaged students. The fact, however, that it may cost more to educate some special needs children does not mean that failure to provide larger scholarships to them represents an effort to discriminate against them. It simply means

that the program may not be as attractive to them as to families with non-special needs children. In addition, the fact that special needs children receive special treatment in public schools not offered to their non-special education peers also serves to make private education less attractive, because they would forego their special benefits and treatment.

This leads me to the heart of my testimony about the Department of Justice's intervention with respect to the Milwaukee Program. But first allow me to make a short confession: in a previous incarnation before I came to work at the Institute for Justice I was a career federal civil rights attorney for 14 years, from 1978 until January 1993. I began my federal career after law school in the Civil Rights Division of the Office of General Counsel in the Department of Health, Education, and Welfare ("HEW"), shortly after HEW's Section 504 regulations took effect. As a brand new attorney in that office most of my time was spent dealing with the new Section 504 regulations, which few people understood despite a four- year long developmental process (Section 504 being a single sentence of the Rehabilitation Act of 1973). After creation of the Department of Education in 1980 I was transferred to its Office for Civil Rights ("OCR"), where I again spent most of my time on disability issues. This focus continued when I was hired by the Department of Justice's Civil Rights Division, and again when I was hired by then-chairman Clarence Thomas as a special assistant at the EEOC. After serving as Director of the Office of Legal Counsel at the EEOC, in 1990 I was appointed to be Deputy Assistant Secretary for Policy in the Office for Civil Rights back at the Department of Education, where I served until President Clinton's inauguration in 1993.

Chief Justice John Marshall observed in 1819 in *McCullough v. Maryland*, 17 U.S. 316, that the power to tax is the power to destroy. It is equally true that the power to regulate also contains the power to destroy. The Department of Justice's intervention in Milwaukee is not the first attempt to derail the MPCP by over-regulation. In 1990, Herbert Grover, the Wisconsin State Superintendent of

Public Instruction and an outspoken opponent of the program, announced that the private schools participating in the program would be functioning as de facto public schools and be subject to the same federal civil rights obligations as the public schools themselves. This announcement was a transparent attempt to discourage private schools from participating in the program, because application of the Title IX regulations would have prevented single-sex private schools from participating and application of the Section 504 regulations requiring that public schools provide a free and appropriate public education would have imposed significant financial burdens far in excess of the value of the scholarship amounts, thereby deterring private school participation. Wisconsin Senator Robert Kasten asked the federal Department of Education if Grover was correct, and I was assigned to chair a small working group that prepared the reply. We concluded that because no federal funds were involved in the program that Title VI, Tile IX, Section 504, and the IDEA did not apply to the participating private schools.

Various groups challenging the constitutionality of the MPCP in court alleged that the private schools had to comply with these federal regulations but the trial judge accepted the conclusions the U.S. Department of Education had reached and held that the private schools were not required to comply with the federal regulations implementing these three civil rights statutes. Ultimately the Wisconsin Supreme Court held that the private schools remained private schools despite their students receipt of state-funded scholarships, and were not de facto public schools. In a very real sense, DOJ's assertions in its ADA letter repeat the mistakes of the public school advocates and treat the private schools as if they are de facto public schools.

The core of DOJ's approach to the MPCP, and its core error, is to regard the State of Wisconsin as "delegating the education function to private voucher schools." In its April 9, 2013 letter to State Superintendent Tony Evers, the Educational Opportunities Section of DOJ's Civil Rights Division concludes its cursory analysis by stating that "In short, the State cannot, by delegating the education

function to private voucher schools, place MPCP students beyond the reach of the federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs." See DOJ Letter at 2. The DOJ Letter concludes that "because DPI is charged with operating the school choice program, it is responsible for monitoring and supervising the manner in which participating schools serve students with disabilities." See DOJ Letter at 3.

DOJ has fundamentally misapprehended the nature of school choice programs like the MPCP. Such programs do not "delegate" the State's education function to private schools: **on the contrary they provide parents with the resources to exercise their fundamental right to direct the education of their own children.** Programs like the MPCP empower low-income parents to send their children to the same private schools their wealthier peers use every day. The State is not responsible for the education provided by the private schools the parents select for their children and the families have no recourse against the State if they are dissatisfied with the schools' performance, although they may have some sort of contractual claim against the schools themselves.

This right of parents to direct the education of their children was affirmed long ago by the United States Supreme Court in a case entitled *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In 1922 advocates for public schools had succeeded in getting the voters of Oregon to require that all students had to attend public schools, which was the longtime goal of the public school establishment. In a suit brought by two private schools that would have been put out of business if the law went into effect, the Supreme Court unanimously rebuffed the public school advocates, saying that:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce, 268 U.S. at 535.

Of course, the right of parents to direct the educational destiny of their children can only be effective if parents can actually choose among educational alternatives. Low-income parents usually lack the means of accessing private education because, unlike the public schools, private schools are part of a private marketplace, providing their educational services in exchange for tuition payments. School choice programs like the MPCP simply try and provide parents will similar access to the private school marketplace that their well-off peers have. But providing eligible low-income families the financial means of accessing private schools is no more a “delegation” of the State’s education function than providing Medicare and Medicaid reimbursements is a delegation of a State’s provision of medical care or providing higher education grants is a delegation of higher education functions to private colleges. No parents are forced to take scholarships for private school, and all parents eligible to use scholarships for their children remain free to send their children to the public schools.

It is precisely this power of parental choice that, when coupled with religious neutrality, prevents school choice programs from running afoul of the Establishment Clause of the federal Constitution. See *Zelman v. Simmons-Harris*, *supra*. If scholarships did in fact delegate the education function to schools receiving scholarship students, unrestricted payments to those schools would violate the Establishment Clause. See *Mitchell v. Helms*, 530 U.S. 793 (2000). Given that DOJ is surely aware of situations where public school districts actually do delegate their responsibilities to private schools, its erroneous application of that concept to the MPCP is hard to fathom.

Treating the MPCP as a program delegating the State’s educational responsibilities is the core of DOJ’s mistaken approach under the Americans with Disabilities Act (“ADA”), but it is compounded by several others. First, DOJ fails to properly read the ADA as a whole, by ignoring the part of the ADA that directly applies to private schools like those participating in the MPCP. Second, DOJ improperly interprets its own regulations by treating DPI as providing services “through a third party.“ DOJ Letter at

2. Thirdly, it ignores its own Technical Assistance Manual, which explicates the relevant regulations and implicitly conflicts with the reading provided in the Letter. And finally, it incorrectly cites cases as support that do not stand for the proposition that DOJ asserts they do, to the extent those cases constitute good law (one does not). I'll address each of these points in turn.

The ADA contains two titles relevant to the DOJ Letter. Title II prohibits public entities like DPI from excluding or denying benefits to qualified individuals by reason of disability from its services, programs, or activities, or subjecting them to discrimination. Title III applies to places of public accommodation, specifically including private schools, although those operated by religious entities are deliberately exempted from coverage. Private schools are not considered "public entities" under Title II and public entities like DPI are not considered "places of public accommodation" under Title III. On its face, DPI is clearly subject to Title II's nondiscrimination requirement in its own activities and no one has questioned that. While the State's administration of the MPCP is plainly subject to Title II, DOJ goes much further and takes the position that DPI is responsible for ensuring that the private schools participating in the MPCP also not discriminate, as part of its administration of the program. As noted, the critical idea that leads DOJ to this conclusion is the idea that DPI is delegating the education function, " : "In short, the State cannot, by delegating the education function to private voucher schools, place MPCP students beyond the reach of federal laws that require Wisconsin to eliminate disability discrimination in its administration of public programs." DOJ Letter at 2. But as previously noted, DPI and the State have not "delegated" the education function to private schools at all. Nor does the State place MPCP students beyond the reach of federal laws – to the extent that any public entity has done so, it is actually the U.S. Congress that has done so by specifically exempting from Title III private schools operated by religious entities. DOJ does not get to trump the deliberate exemption of those private schools from Title III by interpreting Title II to remove the exemption.

DOJ's position with respect to IDEA protection of the same children with disabilities illustrates that it recognizes that scholarship programs like the MPCP do not constitute a delegation of the education function to private the parents choose. In footnote 2 on page 2 of its letter, DOJ acknowledges that students whose parents voluntarily forego IDEA services by placing their children in private schools pursuant to a voucher are not entitled to the "free and appropriate public education" (FAPE") mandated by the IDEA for students in public schools. What DOJ has failed to recognize is that under the IDEA where in fact the school district has contracted out the provision of FAPE for a particular child to a private school, the district has in fact delegated its educational responsibilities (via the contract) and the district remains responsible for ensuring the student receives a free and appropriate public education. In that circumstance the district is obligated to ensure that its contractor provides the required services and the district is liable to the family for any failure of the student to receive all the services FAPE requires.

Unlike the IDEA contracting-out scenario in which the students are publicly-placed in private schools, scholarship programs like the MPCP involve parentally-placed students, and, as noted above, DOJ acknowledges that the districts are not obligated to ensure that the students receive FAPE . The same analysis applies to the ADA, or otherwise the outcome under the IDEA is wrong. But as related statutes, the two should be interpreted together, and the IDEA is both more specific and older, with no indication that the ADA was passed to change the IDEA. Similarly, the fact that that Title III of the ADA specifically addresses the responsibilities of private schools, including exempting religious schools from its mandates, while Title II does not, mandates that the specific treatment of private schools, including the exemption of the subclass of religious schools, trumps any general requirements supposedly established by Title II. What Congress has specifically given in Title III cannot be taken away by an administrative agency like DOJ under Title II. Yet that is precisely what DOJ does in the position asserted in its Letter.

The DOJ regulations implementing the ADA's Title II state that public entities like DPI may not discriminate "through "contractual, licensing, or other arrangements" in its provision of services to individuals with disabilities. See 28 C.F.R. § 35.130(b)(1). This regulation is perfectly reasonable: what is unreasonable is DOJ's interpretation of that regulation as extending to the provision of services by private schools participating in the MPCP. We have already discussed an actual "contractual arrangement" under the IDEA where public entities (local school districts) are responsible for ensuring that private schools provide the same services as the students are entitled to in public schools operated directly by the public entities. But the MPCP is not a situation involving contracting out of services by DPI. DPI merely provides scholarships to eligible individuals whose parents are responsible for selecting schools and contracting with them for educational services. DOJ is supposed to interpret Title II consistently with the IDEA and Section 504, neither of which consider the private schools to be bound to provide the same services that public entities do.

DOJ provides a Technical Assistance Manual ("TAM") to aid the public entities covered by its Title II regulations to comply with those regulations. The TAM provides examples of situations where a contract with a private entity has Title II implications, but those examples (contracting for operation of a restaurant in a public park, leasing a part of a public building, building a publicly-owned stadium through use of a private contractor, contracting with a private vendor to operate group homes) involve the government using a private vendor to provide government services. See The Americans with Disabilities Act – Title II Technical Assistance Manual, II-1.3000 (available at http:/www.ada.gov/taman2.html#II-3000). Again, the interpretation given in the TAM is fully consistent with treating IDEA public-placements of students in private schools, but not with treating parental placements using scholarships.

Finally, the four cases that DOJ cites in its Letter (DOJ Letter at 2) do not support their position. Each involves a situation where a public entity contracted with one or more private entities to provide a

service the government was responsible for providing. These cases are consistent with the regulations, consistent with the TAM, and consistent with the approach taken under the IDEA's treatment of public-placement of children in private schools. They do not support extension of Title II to require DPI to police the private schools chosen by parents under the MPCP.

The first case DOJ cites, *Armstrong v. Schwarzenegger*, 622 F.3rd 1058(9th Cir. 2010), held that Title II covered discrimination against state prisoners that the State placed in county jails via contracts with the county jails. The second case, *Kerr v. Heather Gardens Association*, 2010 WL 3791484 (D. Colo. Sept. 22, 2010), held that a contractor with a public entity responsible for providing senior living care assumed the responsibilities of the public entity under the contract. The fourth case, *James v. Peter Pan Transit*, 1999 WL 735173 (E.D.N.C. Jan. 20, 1999), held that where a public entity, the City of Raleigh, contracted with a private company to operate its public transit system, the public entity (the City of Raleigh) remained responsible for deficiencies in the operation of the buses' wheelchair lifts. The third of the cases DOJ cited, *Disability Advocates, Inc. v. Paterson*, 598 F. Supp. 2d 289 (E.D.N.Y. 2009), cannot be used at all, because DOJ mistakenly characterized the case as having been "reversed on other grounds" by *Disability Advocates, Inc. v. New York Coal. For Quality Assisted Living , Inc*., 675 F.3d 149 (2nd Cir. 2012), when in fact the decision was vacated because the plaintiffs lacked standing to bring suit.[1]

What these cases have in common is that they all involve public entities contracting with private providers to provide public services the public entity could have provided itself. They simply do not support the idea that Title II requires DPI to police the operations of private entities like the private schools participating in the MPCP, which provide private educational services the DPI and local districts cannot themselves provide. Far from supporting DOJ's interpretation of its Title II regulations to the

[1] Although the trial court decision involved a situation where a public entity contracted with a private entity to provide public services, which supports our reading of the regulations rather than DOJ's, a vacated decision has no precedential value whatsoever.

MPCP schools, these cases support the narrower reading limiting those regulations to situations where public entities contract out their own responsibilities.

DOJ also failed to cite two cases that reject its reading of Title II. In *Bacon v. City of Richmond*, 475 F.3d 633(4th Cir. 2007), the Fourth Circuit rejected a claim that because the City funded the public schools it was obligated to remedy the lack of accessibility of school buildings operated by the local district. And in *Liberty Resources v. Philadelphia Housing Authority*, 528 F. Supp. 2d 553 (E.D. Pa. 2007) , the court rejected a claim that Title II required a public housing agency administering the Section 8 rental voucher program to ensure that the private rental properties were accessible to disabled persons. Thus, while none of the cases cited in the DOJ Letter support its overly expansive reading of Title II, two cases directly contradict that reading.

This last case highlights another relevant fact: that there are a considerable number of federal and state subsidy programs that provide individuals with scholarships or vouchers to enable them to buy services from the private marketplace for those services. This means that DOJ's expansive reading of Title II has far-reaching implications for these programs, and would bring within DOJ's Title II enforcement purview a wide range of private entities Congress specifically covered in Title III. Just as private schools are places of public accommodation covered by Title III, so are many of the private businesses involved in these other sorts of voucher programs. In other words, there is no limiting principle that limits DOJ's power grab to Milwaukee and Wisconsin.

The effects of DOJ's position thus have far-reaching ramifications that go beyond the MPCP. But let's focus on its potential effects on the private schools in the MPCP itself, because those potential effects are likely to be typical of effects on other school choice programs, as well as service providers in the wider universe of voucher-type programs. As you may be aware, approximately 85% of the schools participating in the MPCP are religious schools, a slightly lower percentage than the percentage of all

private schools in Wisconsin that are religious (90%). This is, of course, a function of the fact that religious schools predominate in the private school marketplace, for a couple of historical reasons. First, the public schools were originally designed and operated as generically Protestant religious schools, and Catholic immigrants found them to be inhospitable to their religious beliefs. This led the Catholic Church to create its own parochial schools, and even today Catholic schools represent roughly one quarter of all private schools and enroll roughly 41% of all private school students.

Second, after the U.S. Supreme court held that the federal Establishment Clause applied to the states in 1947, it then decided a series of cases secularizing the public schools by largely excluding school prayer, bible reading and religious observances. This led many Protestants previously comfortable with the public schools to create their own religious private schools, such that 67% of all private schools are religious, enrolling 77% of all private school students. Accordingly, in Milwaukee as in the rest of the country, the large majority of the private schools participating in Wisconsin's school choice programs is religious and enroll a substantially larger majority of the private school students.

These private religious schools are largely exempted by Title III of the ADA, but DOJ's action seeks to effectively nullify that exemption that Congress has granted them. If DOJ's action is allowed to stand, those religious schools will understand that the only way to retain their exemption is to withdraw from the program and non-participating religious schools will be deterred from joining the program. This will limit, potentially to a severe extent, the educational opportunities that students desiring to participate in the program can receive. The effect in Milwaukee and elsewhere will be diminished participation by religious schools, the largest sector of the private school marketplace, and will potentially cripple school choice programs by limiting the supply of participating private schools.

Private school organizations are well aware of DOJ's actions, and fully cognizant that if DOJ can do this in Milwaukee it can do it in the ever-growing number of states that have enacted school choice

programs. There are over 40 programs in more than 20 states, all enacted since Wisconsin created the MPCP in 1990. They represent a growing threat to the education status quo , which is essentially a public monopoly based on free public schools drawing nearly unlimited financial support from public funds. Not surprisingly, the supporters of the status quo, in particular the national teachers' unions and their state affiliates, are vigorous opponents of school choice program. They frequently file lawsuits in an effort to halt school choice programs and demand that the politicians that they support oppose school choice. Although increasing numbers of Democrats, particularly those who represent low-income communities, support school choice, the Democratic Party opposes school choice.

It is no secret that the current Administration opposes school choice and would like to roll back the progress made. The Obama Administration has consistently sought to kill the only federally-funded school choice program, the D.C. Opportunity Scholarship Program, which has succeeded in greatly increasing the likelihood of high school graduation for its low-income scholarship recipients. The program has only survived because of the efforts of Speaker of the House John Boehner and former Senator Joe Lieberman, former chairman of this Committee when Democrats controlled the Senate.

Because the federal government does not fund the state school choice programs, the Administration is not in a position to de-fund them, the way it has tried to de-fund the D.C. program. But when in 2011 DOJ received a patently ridiculous complaint under Section 504 and the ADA involving two applicants and students at two religious schools participating in the MPCP and then proceeded to announce in its April 9, 2013 Letter to DPI an approach to Title II enforcement it had never asserted in the past two decades of enforcing the ADA (the ADA was enacted in 1990, the same year as the MPCP), one reasonably suspects that politics has played a role. This suspicion was reinforced when this same component of DOJ, the Educational Opportunities Section of the Civil Rights Division, filed a motion in a moribund civil rights case (*Brumfield v. Dodd*) in Louisiana asserting that Louisiana's new state wide

scholarship program was undercutting efforts to desegregate a couple out of 64 school districts there. The effects DOJ alleged were truly miniscule and a function of a number of eligible African-American students transferring from failing public schools to private schools that were predominantly African-American. The State of Louisiana has been in compliance with *Brumfield* since 1975, when the case required that any private schools participating in two state assistance programs certify to the State they do not discriminate based on race.

These three attacks by the Obama Administration on three different school choice programs in three different jurisdictions, when coupled with the borderline incompetence of the approaches taken in the two legal enforcement actions, suggests the Administration's opposition to school choice has gotten the better of its prosecutorial judgment. The Department of Justice is not exercising its responsibilities in a considered, even-handed manner: it is instead twisting the law to suit its own ends. If the Department is allowed to continue to distort the law, it has the potential to do incalculable damage to the educational opportunities of those families served by school choice programs, families that are disproportionately poor, disproportionately minority, and served by public schools that are disproportionately inferior in performance.

Thank you for the opportunity of sharing my views with the Committee.